IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LINDA L. GINN,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. SA-99-CA-553-FB
	§	
TEXAS WIRED MUSIC, INC. d/b/a	§	
MUZAK SYSTEMS OF SAN ANTONIO,	§	
	§	
Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY OR FOR PARTIAL SUMMARY JUDGMENT

Before the Court are Defendant's Motion for Summary Judgment or for Partial Summary Judgment, Plaintiff's Response, Defendant's Reply, and Plaintiff's Response to Defendant's Reply. Defendant maintains plaintiff cannot prevail on her claims of hostile work environment and constructive discharge based on race, gender, and age because she cannot show that any alleged discriminatory conduct occurred with such frequency that a term or condition of her employment was affected nor can plaintiff show that her working conditions, while strained, rose to the level required for a reasonable person in plaintiff's position to feel compelled to resign. In response, plaintiff contends she has offered evidence which establishes that her supervisor harassed, humiliated, demeaned and ridiculed her because of her race, sex, and/or age, with such frequency and severity that the harassment unreasonably interfered with her work performance and destroyed her opportunity to succeed in the workplace.

Summary Judgment Standard

A motion for summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). A dispute concerning a material fact is considered "genuine" if the evidence "is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is not the Court's function to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The Court must determine if there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. Of course, in ruling on a motion for summary judgment, all inferences drawn from the factual record is viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

If the party moving for summary judgment carries its burden of producing evidence which tends to show there is "no genuine issue of material fact, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish the existence of a genuine issue of material fact for trial." Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996). The nonmoving party may not rely upon mere conclusory allegations to defeat a motion because allegations of that type are not competent summary judgment evidence and are insufficient to defeat a proper motion. Id. In fact, if the "nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation," a motion for summary judgment may be granted even in cases "where elusive concepts such as motive or intent are at issue." Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994).

The party opposing the motion also may not rest on the allegations contained in the pleadings but "must set forth and support by summary judgment evidence specific facts showing

the existence of a genuine issue for trial." Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). In meeting this requirement, the party must "identify specific evidence in the record" and "articulate the precise manner in which that evidence supports his or her claim." Id. Rule 56 of the Federal Rules of Civil Procedure does not impose upon this Court the "duty to sift through the record in search of evidence to support a party's opposition to summary judgment." Id. (quoting Skotak v. Tenneco Resins, Inc., 953 F.2d 909. 915-16 & n.7 (5th Cir.), cert. denied, 506 U.S. 832 (1992)). A summary judgment will only be precluded by disputed facts which are material, i.e. "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Factual disputes which are irrelevant or unnecessary to the issue will not be preclude summary judgment. Id.

Background

Plaintiff was employed by defendant Muzak in the accounting department for over 16 years. During that time, plaintiff had five supervisors, her last supervisor being Robert Vega. Mr. Vega is a Hispanic/Mexican-American male, who was 29 years of age when he became Ms. Ginn's supervisor. Plaintiff contends that shortly after Mr. Vega became her supervisor, he began criticizing her on an almost daily basis.[1] This criticism occurred in the presence of others and in private, one-on-one, closed door sessions in his office. She claims Mr. Vega criticized her work performance, her attitude, her initiative, her creativity, and her behavior or conduct toward her fellow employees. In addition to the criticism, plaintiff claims Mr. Vega demeaned, humiliated, and made fun of her.

[1] In her deposition, plaintiff was asked how often did the incidents occur where she was scolded in Mr. Vega's office. She responded it occurred "periodically."

According to the plaintiff, she was not the only employee subjected to Mr. Vega's harsh treatment. A co-worker, Rosie Smith, was also treated in the same manner and after receiving a severe cut in pay, Ms. Smith resigned her position in April of 1997. Ms. Smith was replaced by a Hispanic female in her early twenties. The only other member in the accounting department was David Valles, a Hispanic male in his mid-twenties hired by Mr. Vega in either January or February of 1996. Mr. Valles was allegedly hired for the purpose of assisting Ms. Smith in the performance of her duties, but plaintiff maintains it soon became apparent Mr. Valles was given preferred treatment in the jobs assigned to him, in pay, and in being included in discussions with Mr. Vega concerning the operation of the accounting department. Moreover, plaintiff alleges Mr. Valles was never criticized, demeaned, or humiliated in the same manner as she was. On or about May 13, 1997, plaintiff received a poor performance evaluation from Mr. Vega, and ten days later the incident described by plaintiff as the "straw that broke the camel's back" occurred.

As described by the plaintiff in her response to the motion for summary judgment, Robert Vega and David Valles began moving their respective offices to more comfortable quarters within the accounting department on Friday, May 23, 1997. Upon hearing the commotion, plaintiff stood up, and looked over the top of her cubicle to see what was going on. She observed Mr. Vega and Mr. Valles moving office furniture into two vacant offices. Until that time, plaintiff thought she and Mr. Valles were peers or equals in the accounting department, and she did not understand why Mr. Valles was being moved into an office of his own while she was still occupying a cubicle in the middle of the department and sharing space with Ms. Hernandez. Plaintiff claims that when Mr. Vega saw her observing the furniture moving activity, "he came over to her, got right in her face, and asked her, in a hostile manner, 'what's the matter with you? Can't you take us moving

a couple of desks?'" Plaintiff describes Mr. Vega's behavior as yelling and acting very unprofessionally. Mr. Vega commented to Ms. Ginn that he was "moving over here so [he could] keep an eye on [her]." Plaintiff claims she was confused and humiliated by Mr. Vega's words and actions, and because she did not want to say anything she might later regret, she decided to leave the office for the day. As she was leaving, she states Mr. Vega followed her and shouted "This is grounds for termination." When Ms. Ginn asked if that was what Mr. Vega was doing, he responded in the negative. As she reached the bottom of the stairs Mr. Vega again questioned her by asking, "are you going to be back?" Ms. Ginn responded she was not quitting.

On the next working day following the incident, Ms. Ginn called Muzak and left voice mail messages for several people including Mr. Vega explaining she was ill and would not be at work that day. Mr. Vega responded by preparing and sending to Ms. Ginn at her home, via hand delivery, a letter. In the letter, Mr. Vega acknowledged receipt of the voice mail message but "criticized her for not attempting to reach him at home before business hours or at work during business hours." [2] Upon receipt of the letter, Ms. Ginn responded through her husband who called Mr. Vega and left him a voice mail message to the effect that Ms. Ginn was "too sick to talk today and will probably be out tomorrow. She has not resigned and she will get with me whenever." The next day, plaintiff's husband called Mr. Vega and spoke directly with him. Mr. Vega was

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[2] The text of the letter reads as follows:

> I am in receipt of your message this morning indicating that you will not be in today due to illness. You should have tried to reach me, your immediate supervisor, at home before business hours or at work during business hours so that we could have an opportunity to talk. I tried, unsuccessfully, to reach you via telephone at 8:10 AM and again at 9:15 AM. Your actions on Friday indicated to me that you had quit your job. Therefore, if I have not been contacted by you by the end of business day today, Tuesday May 27, 1997, I will presume that you will have resigned your position with Texas Wired Music Inc.
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> The letter was signed by Robert L. Vega.

informed Ms. Ginn was still very sick, and Mr. Vega responded by informing plaintiff's husband that she would have to have proof of her illness before her return to work. Mr. Vega also advised plaintiff's husband that he would be sending another letter in which he would repeat his demand for a doctor's certificate. Although Mr. Ginn told Mr. Vera a second letter was unnecessary, Mr. Vega insisted on sending same. Mr. Ginn then asked Mr. Vega why he was harassing Ms. Ginn. No response to that question was received.

True to his word, a second letter arrived at plaintiff's home and was dated May 28, 1997. That letter set forth the scope of the communications which had passed between Mr. Vega and Mr. Ginn and read as follows:

> At approximately 2:15 PM yesterday, I was informed by your husband, via a voice mail message, of the severity of your illness. He indicated that your sickness was such that you could not speak to me yourself. Furthermore, he told me that you would contact me whenever. At about 8:10 AM this morning, your husband called once more to tell me that, once again, due to the severity of your illness, you would not be able to be in today, and were not able to speak to me yourself. Please be advised that by Friday morning, 9:00 AM the 30th of May of 1997, I will need to have documentation from your doctor excusing you from work if you have not returned to work before that time. If you return to work before that time, however, I will need for you to provide the documentation upon your return. When you return, please note that the first order of business will be to discuss the circumstances surrounding the events that took place on Friday May 24, 1997.

On Friday, May 30, 1997, the president of Muzak, William D. Balthrope, advised Mr. Vega of his receipt of a letter of resignation dated May 29, 1997, from Ms. Ginn. The letter advised that Ms. Ginn was resigning effective May 30, 1997, and requested that Mr. Balthrope instruct Mr. Vega to "cease attempting to contact her and/or harass her." Although her resignation was discussed, neither Mr. Vega nor Mr. Balthrope tried to persuade plaintiff not to resign and to return to work.

Following her resignation, Ms. Ginn filed her charge of discrimination with the EEOC. She admits the box to be marked claiming discrimination based on race was not marked on the charge form, but she did note on the intake questionnaire she completed she believed race to be one of the bases upon which she believes the actions of Mr. Vega were based. The Dismissal and Notice of Rights letter was issued on March 5, 1999. That letter indicated that based upon its investigation, "the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge." Following receipt of the letter, this suit was filed.

In Plaintiff's First Amended Complaint, she alleges she was constructively discharged after enduring approximately twenty-one months of continuous harassment, degradation, and humiliation with no relief therefrom to be expected. She claims she was discriminated against on the basis of her race, Anglo, her sex, female, and on the basis of her age, 45. In the motion for leave to file this first amended complaint, plaintiff acknowledges the charge of discrimination she filed with the U.S. Equal Employment Opportunity Commission (EEOC) did not indicate plaintiff's race was a basis of her employer's discriminatory acts, but the Intake Questionnaire she completed did so indicate as did the correspondence she thereafter submitted to the EEOC. Defendant contends plaintiff has not exhausted her administrative remedies as to a race claim and therefore this claim is barred.

Failure to Exhaust Administrative Remedies as to Race Claim

Defendant maintains plaintiff's allegation of discrimination based on race is barred for failure to exhaust administrative remedies because it was not included in her EEOC charge and

therefore, was never investigated by the EEOC. In addition, defendant argues it was never placed on notice that plaintiff was claiming race discrimination, plaintiff had two years while her charge of discrimination was pending with the EEOC to correct any oversight which may have occurred, and it is unreasonable to expect a charge of discrimination based on gender and age to be expanded sua sponte by the EEOC to include an investigation concerning discrimination based on race. Plaintiff relies on her EEOC intake questionnaire which mentions race and her correspondence with the EEOC to support her contention that her race claim is not barred.

A review of the Intake Questionnaire completed by the plaintiff does indicate allegations of harassment and discrimination on the bases of age/sex/race. However, the letters to which the plaintiff refers as evidence of her racial discrimination claim do not support her claim. In plaintiff's letter dated January 16, 1998, she states in the second paragraph, "As I have never been a part of such action before, I am appealing to your agency for assistance in proving this employer has in truth violated my rights and did in fact discriminate against me because of my age and sex." The letter does describe Mr. Vega and Mr. Valles as Hispanic males but that is the extent of any mention of race. The second letter to which the plaintiff refers also does not include claims of discrimination based on race. The letter references hostility towards older working women, the use of the term "Girls" when referring to plaintiff and a co-worker, a newsletter which plaintiff perceived as containing gender based pictures,[3] and a reference to plaintiff's treatment when she called in sick, because plaintiff was a female over 40 and known to be under a doctor's care and

[3] The only mention of this offensive newsletter is in the letter plaintiff wrote to the EEOC which is dated February 14, 1999. Plaintiff asserts she was insulted and offended by the gender based pictures used by Robert Vega in his first accounting newsletter circulated in May of 1997. Robert was depicted by the Merrill Lynch logo of "The Bull," David was depicted by the Merrill Lynch logo of "the Bear," plaintiff was depicted by a picture of a memo pad with a big paper clip, and Lorrie was depicted by the drawing of a light bulb.

taking medication for anxiety and hypertension. The only reference to race appears to be plaintiff's statement that Mr. Vega and Mr. Valles would speak to each other in Spanish. This alone, does not seem to support a race discrimination claim. In addition, two district courts have addressed claims very similar to the one presented here and held the administrative remedies had not been exhausted. McCray v. DPC Indus., Inc., 942 F. Supp. 288 (E.D. Tex. 1996); Clemmer v. Enron Corp., 882 F. Supp. 606 (S.D. Tex. 1995).

In McCray, the EEOC charge alleged race discrimination, the retaliation box was not checked, nor was retaliation referred to in the text of the charge. The plaintiff argued he exhausted his administrative remedies because "he attached to his intake questionnaire a letter he wrote to Charlcye Sells, DPC's Administrative Manager, after his discharge. This letter...mentions the alleged retaliation." McCray, 942 F. Supp. at 295. Plaintiff contended his intake questionnaire with the attached letter was incorporated into the EEOC charge and therefore the charge has references to retaliation. The court found plaintiff to be mistaken. Id. In its analysis, the court explained that intake questionnaires and EEOC discrimination charges are "two separate things," and generally, courts do not "treat intake questionnaires as charges." Id. The court found that "[r]egardless of what McCray's intake questionnaire or its attachment says, McCray has provided no evidence that DPC ever had access to his questionnaire or otherwise received notice from the EEOC that he was asserting a claim for retaliation." Id. The defendant was entitled to summary judgment on the retaliation claim because the plaintiff had failed to exhaust his administrative claims.

In Clemmer, plaintiff asserted she had exhausted her administrative remedies because she completed the EEOC questionnaire and stated her employer had discriminated against her on the

basis of her sex, race, and age. The EEOC charge alleged discrimination based on age and retaliation and did not include allegations based on race and sex. In its discussion the court provided the following analysis:

> [T]he preliminary questionnaire upon which Clemmer relies is only a preliminary questionnaire filled out by an aggrieved party prior to speaking with an EEOC representative. It is not the formal charge of discrimination filed with the EEOC which provides the basis for the EEOC's subsequent investigation. Moreover, Enron never saw the questionnaire until it was produced in discovery in the pending action.
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> While the Court of Appeals for the Fifth Circuit refuses to limit the scope of a civil court complaint to the exact charge filed with the EEOC, it has not extended the scope of a Title VII suit any further than the scope of the EEOC investigation which could reasonably be expected to grow out of the administrative charge. The reasonable limits of an EEOC investigation have been held to include later amendments to a timely filed EEOC charge, as long as the limitations period for the added claims of discrimination has not run, or claims which arise as a reasonable consequence of the claims alleged in the EEOC charge.

Clemmer, 882 F. Supp. at 610. The court found plaintiff's claims of sexual harassment and reverse discrimination were not a reasonable consequence of the claims asserted in her EEOC charge. Id. at 611. The facts which would be considered in an age discrimination and retaliation claim would be entirely different from claims to be considered in a sex or race discrimination claim. In addition, the court noted the defendants were not given notice of these claims "nor the opportunity to participate in conciliation with respect to them." Id.

Based on the record presented and the authorities cited above, this Court finds plaintiff has failed to exhaust her administrative remedies as to her race discrimination claim, and defendant's motion for summary judgment on that claim is GRANTED.

Failure to Exhaust Administrative Remedies as to Constructive Discharge Claim

Defendant also contends plaintiff's constructive discharge claim should be dismissed for failure to exhaust administrative remedies because plaintiff failed to allege constructive discharge

on any basis including age, gender, and race within her charge of discrimination before the EEOC. However, in reading the particulars of plaintiff's EEOC charge, she stated:

> During the period from May 23, 1997, and continuing until May 28, 1997, I was subjected to harassment by my supervisor, Robert Vega, Comptroller, in the following manner: Mr. Vega taunted and ridiculed me while implementing changes in the location of various office personnel. While I was in excused sick leave, Mr. Vega also sent two threatening courier letters to my home. On May 29, 1997, I was compelled to resign from my Accounting Clerk position effective May 30, 1997. I was replaced by a younger male employee.

In order to prove a constructive discharge claim, a plaintiff must offer evidence that the defendant made his or her working conditions so "intolerable that a reasonable employee would feel compelled to resign." Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000)(quoting Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 297 (5th Cir. 1994)). Ms. Ginn alleged in her EEOC complaint she felt "compelled to resign." Therefore, this Court finds her statement sufficient to put the defendant on notice she is asserting a constructive discharge claim.

Hostile Work Environment and Constructive Discharge Claim

In her First Amended Complaint, plaintiff asserts that beginning in January of 1996, and continuing through May of 1997, plaintiff's supervisor, Robert Vega subjected the plaintiff to a course of unmitigated harassment, degradation and humiliation based upon her race, Anglo, her sex, female, and age. On May 29, 1997, after enduring approximately twenty-one (21) months of continuous harassment, degradation and humiliation, with no relief therefrom to be expected, Ms. Ginn involuntarily resigned her employment and was constructively discharged. Having found plaintiff failed to exhaust her administrative remedies as to her race claim, the Court need only consider her claims of gender and race discrimination. In reviewing her discrimination claims, an examination of two components is required: (1) was plaintiff subjected to a hostile work environment that (2) led to her constructive discharge?

In order for plaintiff to prove she was unlawfully subjected to a hostile work environment based on gender and/or age, she must show: (1) she belongs to a protected class, (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex or age; (4) the harassment affected a term, condition or privilege of employment, and (5) the employer knew or should have known about the harassment and failed to take prompt remedial action. Long v. Eastfield College, 88 F.3d 300, 309 (5th Cir. 1996). To be actionable, "the challenged conduct must create an environment that a reasonable person would find hostile or abusive." Id. "Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance." Id.

Defendant maintains plaintiff is unable to show that any alleged discriminatory conduct occurred with such frequency that a term or condition of her employment with Muzak was affected. Taking plaintiff's claims at face value, defendant argues that none of these alleged acts even implicate plaintiff's age, race or gender, much less demonstrate some form of discriminatory or even malicious intent on the part of Mr. Vega. Defendant further argues that plaintiff cannot point to any evidence to demonstrate that a term, condition or privilege of plaintiff's employment was affected. Defendant concedes the work environment was unpleasant but the actions were not so egregious that plaintiff's equal opportunity in the work place was destroyed. In response, plaintiff believes the evidence offered shows she was humiliated, demeaned, and ridiculed because of her race, sex and/or age with such frequency and severity, the harassment unreasonably interfered with her work performance, and destroyed her opportunity to succeed in the workplace.

Plaintiff states any reasonable person would have found the working environment to which she was subjected "downright hostile and abusive."

The Court has reviewed the summary judgment evidence presented. There appears to be no doubt Ms. Ginn subjectively felt Mr. Vega discriminated against her based on her age and/or gender. However, subjective belief alone will not support her claim that the harassment, humiliation, or ridicule was based on her sex and/or age or that it occurred with such frequency and severity that the harassment unreasonably interfered with her work performance and destroyed her opportunity to succeed in the workplace. In addition to the desk moving incident and letters of harassment which form the basis of plaintiff's EEOC complaint and described in detail above, plaintiff recalled several other incidents which occurred prior to that time that resulted in harassment. Plaintiff discussed the first of such incidents as one where Robert called a co-worker Rosie and plaintiff into his office to tell them he was going to hire someone to help Rosie. Plaintiff stated Mr. Vega specifically said, "I want to hire somebody young and right out of school." In plaintiff's presence, Rosie was told she would be a part of the interview process. The promise to Rosie was not kept, and Mr. Vega hired a young person with a bachelor's and master's degree in finance as Rosie's alleged assistant. Plaintiff later admitted she did not feel harassed by that incident, but the comment made showed Mr. Vega wanted young blood in the office. However, this appears to be the only comment or remark made concerning age. The Fifth Circuit has repeatedly held that "'stray remarks' do not demonstrate age discrimination." Equal Employment Opportunity Comm. V. Texas Instruments Inc., 100 F3d 1173, 1181 (5th Cir. 1996).

Plaintiff also discussed in her deposition that she was subjected to humiliation and scolding by Mr. Vega. In particular, plaintiff stated, "he [Mr. Vega] and David would joke around, laugh

at me because I play the accordion. They'd speak Spanish so that I couldn't understand them, just - it was humiliating. It wasn't a professional office atmosphere at all, when somebody can openly criticize you or laugh at you in front of other co-workers or even just to yourself, to your face." Plaintiff also recalled being scolded by Mr. Vega after he heard plaintiff on the telephone with a co-worker, and Mr. Vega apparently did not like what plaintiff said or how plaintiff said it. Mr. Vega told plaintiff to get in his office and "he starts talking to me like this at his desk. 'I'm not going to tolerate this. I'm not going to stand -'that kind of stuff.'" Plaintiff stated there were never any witnesses when Mr. Vega scolded her. She claimed he liked for her to get in his office, Mr. Vega would close the door, and then he "really jumped on me. But people [her co-workers Rosie and David] could see that I had obviously been crying when I left his office."

Although previously mentioned, plaintiff described in more detail the accordion incident which happened one day when Robert Vega and David Valles were in David's cubical. Plaintiff testified both Robert and David were laughing, cutting up and carrying on. Robert popped up and said, "Linda, isn't that right? You used to play the accordion?" When plaintiff answered in the affirmative, "they both just burst out laughing like that's just the funniest thing [they] ever heard, and started speaking in Spanish again, and I just sat down. I didn't know what to say. I didn't think it was funny."

Plaintiff also remembered an incident where she was scolded in front of others. Some changes had just been made in the way some expenses were to be reported. Plaintiff states she was standing up at her desk when Mr. Vega came walking out of his office. He came towards the plaintiff and pointed to his head saying, "What's the matter? Don't you know how to think?" Plaintiff testified Mr. Vega continued to "do that until he got right in front of me and right in front

of my face. And I pulled his arm down and I said, 'Hey, what's the problem?[4] I don't need you to do that.'" In response, Mr. Vega calmed down and told her what his problem was. Plaintiff stated she did not appreciate his actions, she knew David heard it, believed Rosie heard it, and plaintiff remarked she felt like Mr. Vega thought she was "too old or stupid to think." Plaintiff admits the issue was resolved, but the way in which Mr. Vega addressed her was "just totally unprofessional and unnecessary. I've always been cooperative with him, and I don't feel that the way he treated me was necessary."

Plaintiff also talked about an incident after Mr. Vega had bought a new PC which was stationed in David's work area. Mr. Vega was working on the computer, and plaintiff heard new and/or unusual noises coming from the computer. Plaintiff walked around to see what Mr. Vega was doing, and he was playing a game. Plaintiff inquired as to what he was doing, and Mr. Vega responded, "Oh, it's a game darlin', something I'm sure you wouldn't understand." Plaintiff stated she "just shut up and went back to [her] desk."

Plaintiff also complained because Mr. Vega loved to call her darlin' and Linda Louise when he knew Louise was not her name. After hearing these terms a couple of times she got the feeling he was going to continue so she said "No, no." However, he continued to call her darlin' anytime he felt like it.

Another incident of harassment or degradation occurred after plaintiff had been at an accounts payable class. Plaintiff, Mr. Vega, and David Valles were walking upstairs the next morning, and plaintiff told Mr. Vega she was excited about it [the class] because she thought

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[4] The problem was the expenses for Austin were to change in the way they were reported, but plaintiff was not given the correct information to do it the way it was supposed to be done. Plaintiff stated she and Mr. Vega got the issue resolved.

things went well. She also informed Mr. Vega she thought there were some other areas, about which she had learned, that needed to be changed or improved. Mr. Vega just laughed at her and said, "We don't need your help on this, darlin'. This management doesn't need your help, darlin'." Mr. Vega and David then started conversing in the Spanish language and walked off.

The last incident plaintiff described occurred prior to the desk moving incident and involved plaintiff's performance appraisal. Plaintiff testified she told Mr. Vega earlier in the day she had to leave early for an appointment. About 10 minutes before her departure, Mr. Vega called her into his office, handed her the review, and wanted her signature. She asked if she could take it home and review it. He agreed, and she took it home. The next day, plaintiff intended to type her comments during lunch. However, when plaintiff arrived at the office, Mr. Vega wanted the review right away. Plaintiff jotted down a few comments and took the review into his office. Before she could get back to her desk Mr. Vega was on the speaker phone yelling at her to come back to his office. She returned to his office, closed the door and what unfolded at that point was described as follows:

> So I went in there, closed the door, and he's just like this, waving it around. "This doesn't make me look good." And I thought, "Well, I'm sorry. That's the way I feel." And he said, "Well, I'm going to do something about this." And I said, "Whatever you think is right, Robert," and I left his office.

Plaintiff also remembered other incidents in her second deposition such as Mr. Vega deciding that neither Rosie nor plaintiff were allowed to take vacation time during the month of December when he first took over the department; a new employee was assigned office space twice the size of plaintiff's office and in fact she had to give up half her space to accommodate the new employee's office, and Mr. Vega treated plaintiff differently because she was an hourly employee. Plaintiff

stated Mr. Vega watched her like a "hawk" and treated plaintiff like a child with respect to lunch hour, arrival and departure times. On the other hand, David as a salaried employee was treated differently. David took extended lunch hours a lot of the time with Mr. Vega, arrived late several times, left early, and Mr. Vega did not have a problem with that. Plaintiff also mentioned the incident where several of the computer access codes had been changed by Mr. Vega and David over the weekend but no one informed the plaintiff when she arrived for work on Monday. Mr. Vega promised the plaintiff he would not make changes again without telling her. Plaintiff stated that promise lasted about 7 to 8 months before the desk moving incident occurred. Plaintiff also testified that it was a "building sort of thing" that got worse and more frequent. Ultimately, there was a day-to-day dreading of going to work because despite her best efforts, Mr. Vega would find something wrong with her work. No matter what she did, it was not enough. Plaintiff states she was criticized, always given more work but never really had any work taken away. It progressed to a point where she could not handle any more and "yet he kept giving more. I was very, very stressed out by the end."

In order for plaintiff to state a claim under Title VII for age and/or gender discrimination based on a hostile environment theory, she must prove she belongs to a protected class, she was subjected to unwelcome harassment, the harassment was based on age and/or gender (sex), the harassment affected a term, condition or privilege of employment, and her employer knew or should have known about the harassment and failed to take prompt remedial action. Long v. Eastfield College, 88 F.3d 300, 309 (5th Cir. 1996); see Walker v. Thompson, 214 F.3d 615 (5th Cir. 2000)(plaintiff must create fact issue "on each of the elements of a hostile work environment claim: (1) [gender or age] discriminatory intimidation, ridicule and insults that are; (2) sufficiently

severe or pervasive that they; (3) alter the conditions of employment; and (4) create an abusive working environment"). While there is no doubt plaintiff belongs to the protected classes of being female and over the age of 40 and no doubt felt she was being subjected to unwelcome harassment, plaintiff must show something more than she was treated badly and is an over 40 female. See Padilla v. Carrier Air Conditioning, 67 F. Supp. 2d 650, 661 (E.D. Tex. 1999)(close scrutiny of plaintiff's work insufficient without more to establish harassment based on race); McCray v. DPC Indus., Inc., 942 F. Supp. 288, 292 (E.D. Tex. 1996)(to establish prima facie case of hostile work environment, plaintiff must show something more than being treated badly and being a member of a protected class).

Other than one stray remark concerning the hiring of "young blood" and the fact that Ms. Ginn's replacement was a male under the age of 40, there is no evidence the harassment was based on plaintiff's membership in either protected class. The evidence shows Mr. Vega replaced Ms. Ginn's co-worker, who departed prior to Ms. Ginn after receiving a cut in pay, with a female employee, Lori Hernandez-Haecker.[5] Ms. Haecker testified she too was called into Mr. Vega's office for closed door sessions, but Mr. Vega was never ugly to her. She also stated the manner in which Mr. Vega corrected her was the same way he corrected David Valles, but sometimes Mr. Valles was corrected "a little bit harder." This correction of Mr. Valles she witnessed occurred after Ms. Ginn's departure. This employee also testified she never witnessed any maltreatment

[5] The department in which Ms. Ginn worked was initially comprised of Rosie Smith, Linda Ginn, and Robert Vega. David Valles was added in January of 1996. Upon Ms. Smith's resignation, Mr. Vega hired a female replacement. Upon Ms. Ginn's departure, a male replacement was hired. Both replacements as well as Mr. Valles no longer work for the defendant.

towards Ms. Ginn.[6] She stated Mr. Vega "would speak to all of us conversational like. There was correction. How he addressed me was professional. I heard the same with Ms. Ginn and along with David."

Plaintiff also relies on the evidence concerning the better treatment of Mr. Valles as an indication of gender and age discrimination. However, the evidence also indicates Mr. Valles was a salaried employee as opposed to Ms. Ginn and Ms. Smith who were hourly employees, and Mr. Valles held both a bachelor's and a master's degree in finance while neither Ms. Ginn nor Ms. Smith held any college degree. Moreover, Ms. Ginn does not point to any incident or event for which Mr. Valles should have been disciplined and for which he was not. In addition, there is no evidence Mr. Vega ever made a comment to Ms. Ginn concerning her age or that any of the jokes or humiliation endured by the plaintiff were based on or referenced plaintiff's age or gender. In

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[6] Ms. Haecker was asked in her deposition if she was upset by anything Mr. Vega had done on the day of the desk moving incident. Ms. Haecker responded: "Oh, no. No. I pretty much at that point figure whatever they had – like, I could tell in the way she spoke about Robert that she had a lot of hostility towards Robert and in her – in her speaking she had – when she said 'Fric and Frac.' And when she said that, I could – I could tell in her facial expressions that she just – that something was wrong there." Ms. Haecker testified earlier that one time when Robert and David were leaving for lunch Ms. Ginn had looked over the cube they were sharing and said "Oh there goes Fric and Frac." Ms. Haecker asked her why she had said that, and Ms. Ginn responded they were always together, what you told one you told the other, and she may have made a comment to Ms. Haecker about rumors around the company of the two being homosexual. Also on the day the Fric and Frac comment was made, Ms. Haecker recalled another incident with Ms. Ginn that made Ms. Haecker feel uncomfortable. She explained:

> At that day that I remembered – I remember this day she [Ms. Ginn] came to my cube, and that was the same day that we had talked about my salary and Fric and Frac comment were [sic] made. I remember she was wearing a cute turquoise little jumper when she was standing next to me; and when they left, after – after she said Fric and Frac, I – she just – "that Mexican." And I looked at her, and she didn't say anything. At that point I didn't know how to react. I was uncomfortable, kind of looked at her, and then she says – we just carried on a different conversation like it didn't take place. And I didn't know how to take that. That's why I thought when I was given a subpoena I – I had informed Mr. Magnum–Mangum that I thought this would have been racially motivated rather than her thinking that he – that Mr. Vega favored David and that she was feel – felt mistreated.

Ms. Hernandez-Haecker went on to testified that she never observed Mr. Vega making any comments about Ms. Ginn being Anglo, being a woman, or about her age. She also stated she did not believe Mr. Vega was racially biased towards Ms. Ginn but because of the comment Ms. Ginn made and because Mr. Vega, Mr. Valles, and Ms. Hernandez-Haecker were all Hispanic, she thought perhaps Ms. Ginn felt prejudiced in some way.

fact, plaintiff acknowledges this lack of evidence in her affidavit. She states:

> Although Mr. Vega never referred to my age or my sex or my race when he behaved the way I have described, I believe that each of those factors, not in isolation but in combination, was a factor in the way he behaved toward me as his subordinate employee. I believe that because he treated my co worker, Rosielee Smith, who is 48 years of age, female, and White or Anglo, and who was also a long time employee of the company, the same way he treated me. In fact, when Mr. Vega first became our supervisor, Ms. Smith and I were the only two employees under his supervision. But in late January or early February of 1996, Mr. Vega hired David Valles, who, like Mr. Vega, is younger than Ms. Smith and me, and is an Hispanic or Mexican-American male. When I compare and contrast Mr. Vega's conduct and behavior toward Mr. Valles with his conduct and behavior toward Ms. Smith and me, I come to the conclusion that Mr. Vega intentionally discriminated against us on the basis of our age, sex, and race, and that he intentionally created a hostile working environment for us in an effort to encourage us to quit.

The only other evidence plaintiff references to support her conclusion of discrimination is the deposition testimony of Mr. Vega. In this excerpt, Mr. Vega admitted he brought Ms. Smith to tears on one occasion when he told her she would be receiving a decrease in pay because he was reassigning virtually all of her duties to Mr. Valles and Ms. Smith would be left only with collection matters. Again, no reference was made to age or gender and again, there is no reference to any incidents where Ms. Smith was subjected to the same types of scolding and humiliation plaintiff alleges to have endured. Mr. Vega did explain in his deposition that one of the reasons the duties were reassigned was because David had a stronger accounting background, computer systems knowledge, and better suited to do work that would be more accounting in nature than collections. Mr. Vega also considered collections to be "beneath" Mr. Valles' education background but not beneath Ms. Smith's background even in light of her 15 years of

experience with the company.[7] Mr. Vega also testified the reason he told Ms. Smith of her decrease in pay in October when it would not become effective until January was because he had heard her husband was planning to start a new business and was quitting his job. Mr. Vega believed it was the right thing to do to let her know what was going to happen at the first of the year so she would not make any long-term plans based on her present pay scale. Based on the evidence presented, plaintiff has failed to raise a fact issue with respect to the element that the harassment was based on either gender or age.

In addition to proving the harassment was based on gender and/or age, plaintiff must also show the harassment affected a term, condition or privilege of employment. As one court explained:

> Not all workplace harassment affects a term, condition or privilege of employment within the meaning of Title VII. To establish that harassment affected a term or condition of employment, a plaintiff must prove that the harassment was so severe and pervasive that it altered the conditions of employment and constituted an abusive working environment. That requires a plaintiff to "prove more than a few isolated incidents of racial [gender or age] enmity." Instead, "there must be a steady barrage of opprobrious racial comments." The mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee does not affect the conditions of employment to a sufficiently significant degree to violate Title VII. Similarly, racial comments that are sporadic or part of casual conversation do not violate Title VII.

McCray v. DPC Indus., Inc., 942 F. Supp. 288, 293 (E.D. Tex. 1996)(citations omitted). A totality of circumstances must be focused on in determining whether an environment is hostile or abusive. Long v. Eastfield College, 88 F.3d 300, 309 (5th Cir. 1996). Those factors include: frequency of the conduct, severity of the conduct, degree to which the conduct is physically

[7] Although it appears Mr. Vega may be guilty of being an intellectual snob, discrimination based on level of education has not been held actionable or given protected class status.

threatening or humiliating, and degree to which the conduct unreasonably interferes with the employees's work performance. Sheperd v. Comptroller of Public Accounts, 168 F.3d 871, 874 (5th Cir.), cert. denied, 120 S. Ct. 395 (1999); Long, 88 F.3d at 309. The challenged conduct must be "both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so." Sheperd, 168 F.3d at 874. Offhand comments, simple teasing, and isolated incidents (unless extremely serious) will not rise to the level needed to find a change in the terms and conditions of employment. Id. While the Court does not condone the actions of Mr. Vega and does not doubt Ms. Ginn perceived the conduct to be offensive, in considering the totality of the circumstances as case law requires, the Court does not find the conduct to rise to the level needed to find a hostile environment. Moreover, even if the conduct rose to the level needed to fulfill this element, as previously discussed, there is no evidence or indication the harassment endured was based on either gender or age. Defendant's motion for summary judgment as to plaintiff's hostile environment claim is GRANTED.

Plaintiff also alleges she was constructively discharged. Defendant contends that a constructive discharge claim requires a "greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment," citing Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir. 1998), cert. denied sub nom. Benningfield v. Nuchia, 526 U.S. 1065 (1999). Based on this analysis, some courts have dismissed constructive discharge claims after concluding the plaintiff failed to demonstrate a hostile environment claim. Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194 (5th Cir. 1996), cert. denied, 519 U.S. 1055 (1997). Plaintiff takes issue with this analysis because the courts which have stated a constructive discharge claim

requires a greater severity or pervasiveness than a hostile environment claim rely on a case which does not support that proposition, Pittman v. Hattisburg Mun. Separate Sch. Dist., 644 F.2d 1071 (5th Cir. 1981).

In Pittman, the court found Mr. Pittman had proved a racially discriminatory pay differential and was entitled to recovery. Pittman, 644 F.2d at 1076. In addition to his unequal pay claim, Mr. Pittman claimed he was constructively discharged. Although noting that unequal pay was relevant in a constructive discharge determination, that factor alone had previously been held insufficient alone to constitute "such an aggravated situation that a reasonable employee would be forced to resign." Id. at 1077. Under the circumstances presented, the court found no aggravating factors and concluded the "failure to equalize pay did not ipso facto constitute constructive discharge. Pittman's employment conditions were cordial, he was urged to remain, and there was no affront to him aside from inequality of pay." Id.

Citing Pittman as authority and stating in the parenthetical that "constructive discharge requires 'aggravating factors,'" the Fifth Circuit Court of Appeals stated in Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992), aff'd, 511 U.S. 244 (1994), that "[t]o prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." While finding the level of harassment in that case substantial, the court held it did not rise "to the level of severity necessary for constructive discharge," particularly where the company had taken steps to alleviate the problem and told Landgraf to notify them of any further problems. Relying on Landgraf, the Fifth Circuit Court of Appeals in Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 15 & n.7 (5th Cir. 1996), did not consider a constructive discharge claim after reversing a jury

verdict for lack of sufficient evidence to support a hostile work environment claim. Although a hostile environment claim was not presented in Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir. 1998), the Fifth Circuit again reiterated the same proposition concerning the need for greater severity or pervasiveness to establish constructive discharge. The parenthetical supporting the Landgraf cite, referenced the Pittman decision.

Despite its somewhat questionable origin, it appears the greater severity or pervasiveness is a requirement for a constructive discharge claim. From a logical standpoint, it would seem to follow that if a plaintiff cannot support a hostile environment claim, it is unlikely the evidence will support a constructive discharge claim. Even though this Court has not found plaintiff's evidence of a hostile environment sufficient, out of an abundance of caution, the Court will consider plaintiff's constructive discharge claim.

To prevail on this theory, plaintiff must prove the defendant made her working conditions so "intolerable that a reasonable employee would feel compelled to resign. Stated more simply, [Ms. Ginn's] resignation must have been reasonable under all the circumstances." Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000)(quoting Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 297 (5th Cir. 1994)). An objective standard is used in reviewing the challenged working conditions "by examining the specific conditions imposed by the employer, not by considering the employee's state of mind." Boriski v. City of College Station, 65 F. Supp. 2d 493, 507 (S.D. Tex. 1999). Considerably more proof than the establishment of unpleasant working conditions is needed to support a constructive discharge claim. Id.

As set forth in Brown, Title VII forbids an employer from discharging an employee "because of such individual's race, color, religion, sex, or national origin." Brown v. Bunge

Corp., 207 F.3d 776, 781 (5th Cir. 2000)(quoting 42 U.S.C. 2999e-2(a)(1)). The similar treatment is proscribed by the Age Discrimination in Employment Act (ADEA), and both statutes follow the same "evidentiary procedure for allocating burdens of production and proof." Id. The plaintiff must establish initially a prima facie case of discrimination. In order to establish a prima facie case, plaintiff must prove he or she is a member of the protected class, was qualified for the position held, was discharged, and was replaced with a person who is not a member of the protected class after the discharge. Only the fourth element of proof is different in an ADEA case. The fourth element requires the plaintiff to show she was "replaced by someone outside the protected class"; "replaced by someone younger'" or "otherwise discharged because of [her] age." Id. An employee who resigns may satisfy the element of discharge by proving constructive discharge. The evidence needed to support a constructive discharge claim has been explained as follows:

> Whether a reasonable employee would fell compelled to resign depends on the facts of each case, but we consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement [or continued employment on terms less favorable than the employee's former status]..."

Brown, 207 F.3d at 782. From the evidence presented, it appears Ms. Ginn must rely on the factor of "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation" because no evidence has been presented as to any of the other factors. Ms. Ginn states she has offered evidence of Mr. Vega calling her stupid, sarcastically taunting her about moving his and Mr. Valles' offices, threatening her with termination, and taking several

actions in reference to her absence from May 23, to May 28, 1997, he knew were not consistent with, required by, or even allowed by company policy. Plaintiff contends she is not required to prove it was Mr. Vega's intent to obtain her resignation but all of his words and deeds seem to have been calculated to encourage her to quit. She believes her evidence is sufficient to establish a reasonable person in her shoes would have resigned.

Defendant admits the working relationship between plaintiff and Mr. Vega was strained but claims it did not rise to the level so intolerable that a reasonable person would have felt compelled to resign. Plaintiff was not demoted or reassigned to menial tasks during her employment and her salary was not reduced. Plaintiff's allegations reveal a personality conflict which existed between her and Mr. Vega, but that conflict alone is insufficient to support any claim of discrimination. Defendant maintains that none of plaintiff's allegations appear to allude to plaintiff's age, race, or gender or any calculated scheme to force plaintiff to resign.

Although the Court recognizes that the seven factors to determine whether a reasonable employee would feel compelled to resign may be considered singly or in combination, the Court has found no authority nor has any been provided in which the single factor of "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation" resulted in a finding of constructive discharge. See Faruki v. Parsons S.I.P., Inc., 123 F.3d 315, 319 (5th Cir. 1997)(in determining whether reasonable employee would feel compelled to resign many factors are relevant including evidence of badgering, harassment, or humiliation by employer calculated to encourage resignation). Plaintiff has not alleged she was told to find another job, or was faced with the choice of resigning or being fired. See id. Plaintiff made the conscious decision to leave her place of employment following the desk moving incident. It was

only after the plaintiff acted that Mr. Vega reacted by sending her the letters concerning her employment status. Moreover, plaintiff has provided the Court with only her subjective belief or conjecture that Mr. Vega's behavior was "calculated to encourage [her] resignation" based on age and/or gender. Speculation and conjecture of discrimination cannot satisfy the non-party's burden of showing there is a genuine issue for trial. Lawrence v. University of Texas Medical Branch, 163 F.3d 309, 311-12 (5th Cir. 1999).

As the record reflects, Ms. Ginn admitted to whatever behavior was at issue when she was scolded. Ms. Ginn, however, did not find the manner in which she was scolded or the teasing to which she was subjected to with respect to playing the accordion professional. However, it is not the job of the courts to regulate professional office behavior. As one court noted, the mere fact an employee experiences pressure or feels "nitpicked" does not rise to the level necessary to establish working conditions which are so intolerable as to result in a constructive discharge. Aikens v. Banana Republic, Inc., 877 F. Supp. 1031, 1039 (S.D. Tex. 1995). Relying on words of wisdom from the Fourth Circuit Court of Appeal, the court commented:

> Every job has its frustrations, challenges, and disappointments; these inhere in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress.

Id. at 1039-40. Therefore, based on the evidence presented, the Court does not find the plaintiff has presented evidence to raise a genuine issue of fact that the working conditions were so difficult or unpleasant that a reasonable person in Ms. Ginn's shoes would have felt compelled to resign. Because no adverse employment action is found when the circumstances do not support constructive discharge after a voluntary resignation, plaintiff cannot establish the third element of

her prima facie case for discrimination. Boriski v. City of College Station, 65 F. Supp. 2d 493, 513 (S.D. Tex. 1999).

Plaintiff also challenges and objects to the defendant's filing of a reply and requests that this Court strike the same from the records without giving it any consideration. Plaintiff contends there is no provision for this filing in either the Federal of Civil Procedure or the Local Rules for the Western District of Texas. Plaintiff's request is denied. In the Order Concerning Consent Trials, Discovery, Pretrial Matters, and Pretrial Order issued in this case on June 28, 1999 (docket #5), the Court references the use of reply briefs at number 11 and sets out the response time in which they may be filed with the caveat that the Court may rule on a motion without awaiting a reply brief.

Therefore, based on the evidence presented and for the reasons set forth in defendant's briefs as well as set out herein, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (docket #35) is GRANTED and this case is DISMISSED. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 10th day of August, 2000.

FRED BIERY
UNITED STATES DISTRICT JUDGE